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April 5, 2001

BY COURIER

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***In the Matter of The Use of Unbundled Network Elements to Provide Exchange Access Service and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98***

Comments of BroadRiver Communications Corporation, Epana Networks, Inc. and Quantum Telecommunications, Inc.

Dear Ms. Salas:

Pursuant to Sections 1.419, and 1.49(f) Commission's Rules, BroadRiver Communications Corporation, Epana Networks, Inc. and Quantum Telecommunications, Inc., by its attorneys submit one paper copy of their comments in the above captioned proceeding and are filing these comments electronically.

Kindly date stamp and return the enclosed additional copy of this filing. Please contact the undersigned if you have any questions about this matter.

Respectfully yours,

Erik J. Cecil

Counsel to BroadRiver Communication Corporation, Epana Networks, Inc. and Quantum Telecommunications, Inc.

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
The Use of Unbundled Network Elements to Provide Exchange Access Service	)	
	)	
And	)	CC Docket No. 96-98
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	
	)	

COMMENTS OF BROADRIVER COMMUNICATIONS COMPANY, EPANA NETWORKS, INC. AND QUANTUM TELECOMMUNICATIONS, INC.

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Nashville - and eventually plans to expand nationwide. Unlike traditional circuit-switched providers, BroadRiver operates a next-generation packet-switched network to provide seamless, end-to-end voice and data communications over a single "converged" network. BroadRiver's carrier-class Quality of Service ("QoS") functionality provides its customers with toll-quality voice and the flexibility to define the prioritization scheme of other applications running over the network.[1]

BroadRiver's packet-switched network has notable operational advantages over traditional circuit-switched networks, including the ability to serve a very broad geography with a single soft-switch.[2] Despite these capabilities, the greatest limitation faced by next-generation carriers remains the physical transmission medium itself. Although the technology is bandwidth agnostic[3], there are very few, if any, viable last-mile providers in the Tier II and Tier III markets capable of offering widespread non-switched connectivity. Until other alternative facilities become available, viable deployment of IP-based, next-generation soft-switch technology will remain highly dependent upon the ILEC's existing network infrastructure.

Epana Networks, Inc.

Epana Networks, Inc. ("Epana") provides broadband network solutions utilizing its own facilities and unbundled T1 and T3 circuits to reach customers. Epana will utilize

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[1] These service capabilities differentiate carriers like BroadRiver, Epana and Quantum from VoIP providers utilizing the public Internet for "best efforts" voice services that are not toll quality.

[2] Capital expenditures are reduced significantly since the cost of a soft-switch is approximately one-fifth of the cost of a traditional voice switch (i.e. Lucent 5ESS or Nortel DMS). Also, less complex network operations result in lower operating costs.

[3] Next generation switching technology can be adapted to operate using a variety of transmission medium such as: DS1/DS3, ADSL/XDSL, Gigabit Ethernet, NMLI, Optical and Fixed Wireless.

next generation equipment to provide broadband solutions using an IP-based network to provide services to customers at dramatically reduced costs.

Quantum Telecommunications, Inc.

Quantum Telecommunications, Inc. ("Quantum") is a next generation carrier utilizing soft switching technology serving the mid-Atlantic region. Quantum plans to offer advanced voice and data services over an IP-based network, including T-1 and DSL circuits to small and medium sized business and telecommuters. Quantum plans to strategically deploy IP-routers in COs, which will be connected to Quantum's core switching facilities to provide a facilities-based end to end telecommunications solution for its customers.

II. STATEMENT OF INTEREST

In this proceeding the Commission seeks comment on whether combinations of unbundled network elements ("UNEs"), specifically, Enhanced Extended Links ("EELs"), could be used for the sole or primary purpose of providing exchange access service. The EELs debate has focused on the implementation of special access conversions in only the most populous urban areas, where, as the FCC acknowledges, competitive pressures are greatest.[4] Meanwhile, the Commission's stated policy objectives of encouraging the development of new technologies and the deployment of broadband facilities, particularly, where such capability is least available – all areas

[4] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 253 (1999) ("*UNE Remand Order*") ("We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link (EEL), requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within Density Zone 1 in the top 50 metropolitan statistical areas (MSAs)").

outside of Density Zone 1 of the Top 50 MSAs - receives little attention.[5] Simply put, precisely the same policy considerations that justify the Commission's original decision to unbundle local circuit switching on a national basis, also justify nationwide EELs availability. In other words, the FCC's logic for requiring ILECs to provide unbundled local switching and loop combinations (*i.e.* the UNE Platform or "UNE-P")[6], applies with even greater force to nationwide EELs availability, since an EEL is the functional equivalent of an "unintelligent" UNE-P.[7] With EELs, carriers can enter new markets using next-generation technology, even those markets dominated exclusively by the ILECs.[8] Up until now, CLECs could deploy switching facilities in appreciable numbers

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[5] We will reference the reasons geographic limitations on EEL availability are inconsistent with the Commission's Rules and the Telecommunications Act of 1996. Please note, however, there are currently restrictions on the number of lines

[6] *See UNE Remand Order*, ¶ 253 ("Based on the record, we find that, in general, lack of access to unbundled local switching ***materially raises entry costs, delays broad-based entry, and limits the scope and quality of the new entrant's service offerings***. As discussed in detail below, our unbundling analysis focuses upon the ability of a requesting carrier to self-supply switching because the record does not support a finding that requesting carriers, as a general matter, can obtain switching from carriers other than the incumbent LEC") (emphasis added). ("[O]ur decision to unbundle local circuit switching is consistent with the 1996 Act's goals of rapid introduction of competition and the promotion of facilities-based entry").

[7] UNE-P is a combination consisting of local loop and unbundled switching. EELs are combinations consisting of local loop, cross connect/multiplexing and unbundled transport. For all practical purposes, CLECs operating their own switch in conjunction with an EELs-based network are identical to ILECs operating their own switch and providing local loops. Ironically, under the current policy non facilities-based CLECs can advantageously leverage the ILEC network using UNE-P, while the facilities-based CLECs cannot do so because it must collocate at *every* end office it seeks to serve. This seems paradoxical given the FCC's stated goal of encouraging new innovation and rapid deployment of facilities-based competition.

[8] By operating a packet-switched network topology, BroadRiver and other next-generation carriers have developed the capability to serve a much broader geographical area and provide expanded area service ("EAS") for customers more efficiently than traditional circuit-switched providers. In a packet network, carriers can use a single softswitch to provide signaling and CLASS features across many different geographical markets, thereby allowing the carrier to spread the cost of the softswitch over a larger addressable customer-base. *See also UNE Remand Order* at ¶ 259 ("We find that the ability of a requesting carrier to provision EELs more quickly than collocation arrangements, without the substantial upfront costs of establishing collocation in multiple central offices, can reduce significantly the costs of self-provisioning a switch in the initial phase of an entry strategy"); *Id.* at ¶ 260 ("Requesting carriers therefore will encounter generally greater direct costs per subscriber when provisioning their own switches, particularly in the early stages of entry when requesting carriers may not have the large number of customers that is necessary to increase their switch utilization rates significantly. When we examine the market as a whole, we find that requesting carriers incur higher costs due to their inability to realize economies of scale using

only in those markets with a large, profitable base of business customers.[9] In those other areas, CLEC facilities-based deployment remains virtually non-existent due to the substantial investment required for deploying and operating switching and collocation facilities.[10]

As recent market experience demonstrates, competition will not survive if forced to remain captive to the ILEC's networking architecture and deployment processes. Widespread EELs availability solves this problem. CLECs gain the necessary autonomy and independence to deploy their networks without the imposition of unnecessary costs and delays endemic in the highly inefficient practice of deploying a new network on end office-by-end office collocation basis. Nationwide EEL availability will accelerate the rollout of next generation networks and bring facilities-based competition to all markets, not just the top 50 MSAs.

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circuit switching equipment. We find that the scalability of a switch mitigates but does not eliminate the incumbent LEC's scale advantages and reduces but does not eliminate competitor's sunk costs and entry barriers").

[9] *Id.* at ¶ 254 ("SBC, using a methodology that tracks requesting carriers' switches by examining migration of lines using ported numbers, contends that within the 50 largest MSAs, competitors' switches currently serve approximately 75 percent of all BOC and GTE rate exchange areas").

[10] *Id.* at 260 ("We find that, as a general proposition, requesting carriers will incur a materially greater cost when self-provisioning switching at low penetration levels. As a requesting carrier's switch utilization rates increase, the difference between the switching costs incurred by competitive and incumbent LECs decreases, but the impact of this difference does not become irrelevant in the impair analysis until incumbent LEC and competitor's switch utilization levels are more comparable. ***Market facts show that that competitors have made inroads into the local telecommunications markets, but they have garnered only between 2.6 percent to 5 percent of the market for switched telecommunications services.*** Significant portions of these figures represent service to medium and large business customers, rather than to the mass market. Accordingly, we find that as a general matter, requesting carriers have not gained sufficient market share to generate switch utilization rates and economies of scale comparable to the incumbent LEC, particularly to serve the mass market").

II. COMPETITION IS IMPAIRED NATIONWIDE WITHOUT NATIONWIDE ACCESS TO EELS

The twin policy goals of the 1996 Act cited by the Commission in support of nationwide availability of unbundling local circuit switching strongly support enhanced EELs availability as well - both allow carriers to rapidly enter local markets and accelerate the development of alternative networks.[11] The FCC has viewed unbundled local switching as a method a CLEC can and should use as an interim strategy to obtain market entry, not as a long-term business strategy for bringing competition to local markets. [12] Instead, the sustainable long- term strategy was for facilities-based providers to obtain market entry using EELs, then add collocation sites as the economics of circuit

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[11] *Id. at* ¶¶ 273, 274; Also according to Congress' Joint Explanatory Statement, the purpose of the 1996 Act is "to provide for a pro-competitive, de-regulatory national policy framework designated to accelerate rapidly the private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition. . . ." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. at 113 (Joint Explanatory Statement). Three principal goals established by the telephony provisions of the 1996 Act are: (1) opening the local exchange and exchange access markets to competitive entry; (2) promoting increased competition in telecommunications markets that are already open to competition, including the long distance services market; and (3) reforming our system of universal service so that universal service is preserved and advanced as the local exchange and exchange access markets move from monopoly to competition. In this rulemaking and related proceedings, we are taking the steps that will achieve the pro-competitive, deregulatory goals of the 1996 Act. The Act directs us and our state colleagues to remove not only statutory and regulatory impediments to competition, but economic and operational impediments as well. We are directed to remove these impediments to competition in all telecommunications markets, while also preserving and advancing universal service in a manner fully consistent with competition.

[12] *Id. at* ¶ 274 ("We also find that the availability of unbundled switching will also accelerate the development of alternative networks because it will allow requesting carriers to generate revenues to justify the construction of new switching facilities"); See Id, Note 544 ("As noted above, many carriers emphasize that they plan to deploy alternative facilities as soon as it is technically and economically possible to do so at a cost close to the incumbent LECs' prices for network elements"; Note 545 ("Granting requesting carriers access to unbundled switching will allow these carriers to serve customers in areas where traffic volumes and customer densities make it difficult initially to justify deploying a switch. Furthermore, allowing requesting carriers to purchase unbundled switching will allow new entrants to test market demand for circuit switched services before deploying their own facilities. As requesting carriers obtain customers using unbundled switching, we expect that the revenues generated from this activity will enable requesting carriers to extend the reach of their existing switching capabilities or deploy switching capability to serve the residential and small business market").

versus collocation costs warranted.[13] In this regard, EELs, like the UNE-P, can best be viewed as a temporary measure to "jump-start" a CLEC in a given market, allowing it to overcome the disadvantages of the ILECs scale until it obtains adequate scale of its own.[14]

The FCC concluded in its *UNE Remand* "impairment" analysis that competitive carriers experience impairment nationwide absent the availability of unbundled local switching.[15] In support of this conclusion, the FCC found: i) the total costs of self-provisioning a switch impose a significant cost disadvantage on the CLEC relative to the ILEC,[16] ii) the ILECs retain "material" scale advantage with regard to provisioning and operating local switches,[17] iii) collocation delays materially diminish the ability of a requesting carrier to provide the services it seeks to offer,[18] and iv) the coordinated loop cutover process imposes a material delay and materially limits the scope of customers a carrier may serve quickly.[19]

The most severe impairment is in areas outside of Density Zone 1 of the top 50 MSAs, yet, ironically, EELs are not available there. Although switches deployed by a CLEC can usually serve larger geographical areas than those deployed by the ILEC, this

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13 *Id. at* ¶ 289 ("When projected EEL costs exceed projected collocation costs, competitive LECs may reconfigure their networks to ensure the continued efficiency of their networks. We conclude that requesting carriers, reacting to marketplace demands and their own network topologies, are better able to weigh the costs and benefits of EELs compared to collocation and adjust their plans accordingly").

14 *Id. at* ¶ 299 ("Our decision [to relieve the ILEC from unbundling switching pursuant to the UNE-P carve out rules] also provides requesting carriers with access to the elements they need to ramp up towards continued deployment of self-provisioned switches and is therefore consistent with our policies of encouraging facilities-based competition and encouraging innovation").

15 *Id. at* ¶¶ 252, 253, 275.

16 *Id. at* ¶ 259.

17 *Id. at* ¶ 260.

18 *Id. at* ¶ 270.

19 *Id. at* ¶ 267.

dynamic alone is not enough to ensure the CLEC achieves comparable scale economies.[20] As the FCC noted, the problem is the cost and time associated with physical collocation, which "imposes materially greater costs on requesting carriers than use of the incumbent LECs switching."[21] The only way a new CLEC can compete effectively in these new local markets, particularly those outside of the Top 50 MSAs, is by relying on UNE-P or EELs. The advent of the UNE-P achieves this result for circuit-switched providers; the EEL for packet-switched providers. ILECs should be obligated to make both available outside of Density Zone 1 of the Top 50 MSAs, where CLEC impairment is most dramatic.

III. CURRENT RULES DISCRIMINATE AGAINST NEXT GENERATION, IP-BASED NETWORK PROVIDERS

Despite the similarities of UNE-P and EELs, practical operational differences impose *de facto* discrimination against packet-switched carriers, who are unable to incorporate a UNE-P strategy into their business models. UNE-P strategy is not economically viable for a packet-switched provider either as a stand-alone strategy or to be used in conjunction with an EELs strategy. To implement a UNE-P strategy, the provider would have to: i) offering two product sets[22]; ii) promulgating two marketing

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20 *Id. at* ¶ 261 ("We recognize that switches deployed by competitive LECs may be able to serve a larger geographical area than switches deployed by the incumbent LECs, thereby reducing the direct, fixed cost of purchasing circuits switching capacity and allowing requesting carriers to create their own switching efficiencies...This dynamic mitigates, to a varying degree, incumbent LEC advantages of scale, but does not enable competitive LECs to achieve comparable scale economies, particularly in the early stages of entry").

21 *Id. at* ¶ 263.

22 UNE-P is a very limited offering, which does not include services such as high-speed Internet access, email, application service provider services, or web hosting.

messages,[23] iii) developing separate operational and customer support processes,[24] and iv) incurring significant financial and administrative costs in eventually migrating the customer to the packet-network.[25] The result is that start-up packet-switched providers are at a material disadvantage to circuit-switch providers, so long as the availability of EELs is not equal to, or greater than, the availability of UNE-P.[26]

The availability of unbundled local switching does not adequately addresses the competitive impairment faced by packet-switched providers outside Density Zone 1 of the top 50 MSAs. Since such carriers cannot use ILEC unbundled switching, they remain impaired. The record in this proceeding does not support a finding that sufficient competitive alternatives to ILEC interoffice transport and loops exist for packet-switched providers unable to take advantage of ILEC local switching outside Density Zone 1 of the top 50 MSAs.[27]

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[23] Dual marketing messages would impose significant costs on the organization and run the real risk of creating widespread customer confusion, since it will be difficult, if not impossible, to explain why the packet-switched services are available in some markets but not others. In our opinion, this imposes a significant regulatory burden not only on the carrier, but the general public for whom the regulations were ultimately designed to protect.

[24] The UNE-P network would require additional procedures for provisioning, installations, monitoring, maintenance, troubleshooting and different requirements for customer care.

[25] Without the availability of EELs, next generation network providers must collocate in that customers Serving Wire Center ("SWC"), forcing them to either: transition the customer by incurring collocation expenses that are not yet justified, or simply continue serving the customer with UNE-P until enough customers from that SWC are obtained. Of course, given the "me-to" product set, the company's entire competitive advantage is nullified, making the probability of successfully scaling UNE-P highly unlikely. In this scenario, they are left once again with an underserved customer despite the fact that the new technology is available and could be provisioned economically using EELs.

[26] This proposal does not discriminate against circuit-switched providers or any other type of technology. Rather, it removes the current discrimination against IP-based providers who would like to extend the reach of their facilities to smaller, still-underserved markets outside Density Zone 1 of the top 50 MSAs.

[27] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Review of Sections 68.104, and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network* First Report And Order And Further Notice Of Proposed Rulemaking In Wt Docket No. 99-217, Fifth Report And Order And Memorandum Opinion And Order In Cc Docket No. 96-98, And Fourth Report And Order And Memorandum Opinion And Order In Cc Docket No. 88-57, 22 CR 1, ¶ 4, 5 (October 25, 2000) ("we have recognized that the greatest long-term benefits to consumers will

The logic of the FCC's reasoning and the realities of the marketplace are inescapable. First, lack of competition outside Density Zone 1 of the top 50 MSAs warrants ILEC unbundling of the entire UNE platform. Second, competitors should be free to leverage UNEs in a manner that allows successful deployment of next-generation telecommunications technologies. The FCC has repeatedly reaffirmed this view throughout the local competition orders[28] and in related Rules:

> An incumbent LEC shall provide a requesting telecommunications carrier access to an unbundled network element, along with all of the unbundled network element's features, functions and capabilities, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element.[29]

Despite their deployment of advanced switching technology, under current conditions, packet-switched providers seeking to expand market coverage are confronted with a "no-win" proposition. They have two choices. Collocate at multiple end offices long before traffic volumes justify the investment,[30] and suffer large upfront capital losses. Or alternatively, attempt to use the UNE-P-

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arise out of competition by entities using their own facilities. Because facilities-based competitors are less dependent than other new entrants on the incumbents' networks, they have the greatest ability and incentive to offer innovative technologies and service options to consumers. Moreover, facilities-based competition offers the best promise of ultimately creating a comprehensive system of competitive networks, in which today's incumbent LECs no longer will exert bottleneck control over essential inputs, but will compete on a more equal basis with their rivals. . . . We believe that competitive providers will continue to play a vital role in the growth and ubiquitous availability of advanced services, both by innovating themselves and by placing competitive pressure on the incumbents to offer more advanced services at attractive prices").

[28] *Id.*, *See also, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 27, 226 (1996) ("*Local Competition First Report and Order*") and *UNE Remand Order*, ¶ 13.

[29] 47 CFR § 51.307(c); *See also* 47 USC § 251(c)(3) ("An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications services").

[30] *See UNE Remand Order* at ¶ 289 ("We find that the ability of a requesting carrier to provision EELs more quickly than collocation arrangements, without the substantial upfront costs of establishing collocation in multiple central offices, can reduce significantly the costs of self-provisioning a switch in the initial phase of an entry strategy").

maintain two networks, two marketing messages and two product sets — and incur recurring operational losses.

Current geographic restrictions on EELs availability unfairly disadvantage packet-switched providers and, absent remedy will contribute to the further erosion of facilities-based competition. Through the use of the EEL, packet-switched providers can and will enter into direct competition with ILECs with integrated bundles of voice and data services,[31] as well as new, innovative services.[32] To have long-run viability, the CLEC industry must be provided with the practical means to compete utilizing these differentiated services.[33] Packet-switched providers can do this today if given access to EELs nationwide and thus restored to parity with circuit-switched providers.

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[31] For example, BroadRiver currently offers a bundled service consisting of: 768Kbps bandwidth; up to 8 voice lines with local service including Directory Assistance, Operator Services and 911; 24 different CLASS features, High Speed Internet usage, 1000 long distance minutes, 10 email accounts, 5 voice mail accounts and 1 Internet dial-up account.

[32] *See* "Softswitch Market Analysis: Reinventing the PSTN", Analyst: Thomas S. Valovic, IDC (2000), at p. 23 ("The hope for the [softswitch industry]—indeed, an essential reality that must come about for the new public network vision to succeed—is that services developed under this scenario will be far more creative, innovative and user-responsive than what has been possible thus far under the older model driven by proprietary switch vendors. The ideal scenario, in fact, is to duplicate for the telecom world the creative entrepreneurial expansion that took place in the PC industry when applications were first being developed for that marketplace").

[33] *See* "Emerging Local Telecom Update & Outlook—Where Do We Go from Here?, David J. Bank, RBC Dominion Securities (October 26, 2000), 10 ("Providing voice services is not enough to create a dominant business model. The bundled, one-price, "any distance" voice product, along with data transport and Web-hosting services for the SME space rolled out by XO Communications in the third quarter, illustrates what we believe business customers will come to demand from all service providers. To survive, CLECs must be able to combine broadband assets with value-added applications that enhance business customers' productivity and profitability. Simply put, providers that cannot offer an integrated service package will probably not survive. Importantly, given the regulatory climate today, we believe that CLECs are uniquely positioned to emerge as pioneers of bundled service packages.") In our opinion, the "regulatory climate" refers to the availability of EELs and other pro-active positions the FCC has taken on opening up the ILEC network to competition.

IV. THE COMMISSION SHOULD CLARIFY THAT RULE 315(b) BROADLY APPLIES TO UNES THAT ARE ORDINARILY COMBINED WITHIN THE ILEC'S NETWORK

BroadRiver supports FCC's position that the Supreme Court's decision to reinstate Rule 51.315(b)[34] based on the non-discrimination language of Section 251(c)(3)[35] applies equally to rules 51.315(c)-(f).[36] While the Supreme Court specifically found that Rule 51.315(b) reasonably interprets § 251(c)(3), it also necessarily follows that requiring ILECs to combine unbundled network elements is not inconsistent with the Act.[37] The Act does not say or imply that network elements may only be leased in discrete parts.[38] Therefore, BroadRiver requests that in the 4th Report and Order, the FCC provide certainty on the issue and promulgate regulations explicitly obligating the ILECs to allow CLECs to order new EELs that are "ordinarily combined" in the ILEC network.

In *Iowa Utilities Board*[39], the Supreme Court held that the FCC erred in interpreting the ILEC's unbundling obligations as "impos[ing] on an incumbent LEC *the duty to provide all network elements for which it is technically feasible to provide access*." According to the Supreme Court, the proper reading of §251(c)(3) requires the

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34 47 CFR § 51.315.

35 47 USC § 251.

36 *See UNE Remand Order*, ¶ 481 ("Specifically, the Court held that Section 251(c)(3)'s non-discrimination requirement means that access provided by the incumbent LEC must be at least equal in quality to that which the incumbent LEC provides to itself. We note that incumbent LECs routinely combine loop and transport elements for themselves. For example, incumbent LECs routinely provide combinations of loop and transport elements for themselves to: (1) deliver data traffic tot heir own packet switches; (2) provide private line services; and (3) provide foreign exchange service").

37 *U.S. West Communications v. MFS Intelenet, Inc.*, 193 F3d 1112, 1121 (9th Cir 1999), cert. denied, 68 USLW 3669 (US June 29, 2000) ("It also necessarily follows from AT & T that requiring US West to combine unbundled network elements is not inconsistent with the Act: the MFS combination provision does not conflict with the Act because the Act does not say or imply that network elements may only be leased in discrete parts").

38 *Id.*

39 *AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721, 736 (1999) ("*Iowa Utilities Board*").

Commission "to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[40] The 8th Circuit did not rule on that issue. Instead, the 8th Circuit reiterated their prior opinion that: "[T]he Act does not require the incumbent LECs to do all the work."[41] Thus, the current state of the law on the issue of whether an ILEC is obligated to affirmatively combine those network elements that it routinely combines in its network for a carrier at the carrier's request remains ambiguous.

Although this matter currently is on appeal to the United States Supreme Court, given the immense importance of this specific issue for the CLEC industry – in particular, it's impact on facilities-based deployment by next-generation packet-switched carriers - we ask that the FCC clarify its position in one of two ways.

First, the Commission should follow, as recommended by COMPTEL, interpret "currently combines" in Rule 315(b) consistent with the definition in the *First Report and Order*, which is "ordinarily combined within their network, in a manner which they are typically combined."[42] Such an interpretation would not rely on the reinstatement of Section 315(c)-(f), since it has independent support in Section 315(b). As COMPTEL

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40 *AT&T Corp. v. Iowa Utilities Bd.*, 119 S.Ct. 721, 736 (1999) ("*Iowa Utilities*").

41 *See Iowa Utils. Bd. v. F.C.C.*, 219 F.3d 744, 759 (8th Cir. 2000); *citing Iowa Utils. Bd., 120 F.3d at 813* ("The 8th Circuit did not address the issue whether the Act prohibited the combination of network elements, but whether in subsection (c)-(f) who should be doing the combining, the ILEC or the CLEC. The 8th Circuit stated that Congress "has directly spoken" on the issue and resolved that it is the *requesting carriers (emphasis added)* who shall "combine such elements" pursuant to the express language in §251(c)(3)). *Compare U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1121 (9th Cir. 1999)* (The 9th Circuit plainly states that: the "Supreme Court's interpretation of 47 U.S.C. §251(c)(3) demonstrates that the 8th Circuit erred when it concluded that the regulation was inconsistent with the Act. We must follow the Supreme Court's reading of the Act despite the 8th Circuit's prior invalidation of the nearly identical FCC regulation").

42 *See, e.g.*, Comptel Ex Parte Letter, "CC Docket No. 96-98—Joint Ex Parte Proposal to Limit the Use of the Enhanced Extended Link ("EEL") filed February 28, 2000", filed March 13, 2000. *See also, Local Competition First Report and Order*, ¶ 296.

has pointed out, in *Iowa Utility Board* the Supreme Court "... did not state that it was reinstating Rule 315(b) only to the extent it prohibited incumbents from ripping apart elements currently physically connected to each other. It reinstated Rule 315(b) in its entirety, and it do so based on its interpretation of the nondiscrimination language of Section 251(c)(3)."[43] The interpretation also finds strong support from the 9th Circuit's holding in *U.S. West Communications v. MFS Intelenet, Inc.*, where the court reiterated that "requiring [the ILEC] to combine unbundled network elements is not inconsistent with the Act...the Act does not say or imply that network elements may only be leased in discrete parts."[44]

In addition, we urge the Commission, consistent with the recommendation of COMPTEL, to define the EEL as an individual UNE in addition to being a UNE combination. As COMPTEL has noted, this approach is consistent with Section 251(c), and is administratively easier to implement than relying on the Commission's combination authority to require access to the EEL.

The Commission's swift action in requiring ILECs to provide "ordinarily combined" EELs will establish parity once again between CLEC and ILEC. In the Local Competition First Report and Order the FCC articulated principles concerning the need to promulgate national rules defining "nondiscriminatory access" to unbundled network elements that remain undisturbed by the Eighth Circuit's ruling.[45] The FCC found that "nondiscriminatory access" in Section 251(c)(3) meant at least two things: i) that the quality and access to an unbundled element must be equal between all carriers requesting

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43 *Comptel Letter* at 6.

44 *U.S. West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 *(9th Cir. 1999).*

45 *See Local Competition First Report and Order*, 11 FCC Rcd 15657, ¶ 309; *See also UNE Remand Order* at ¶ 490.

access to that element; and ii) that where technically feasible the ILEC must provide access to the network element in substantially the same time and manner that the ILEC provides itself (emphasis added).[46] This is perfectly consistent with this interpretation of Section 251(c)(3), since all carriers would be able to purchase UNE elements "in substantially the same time and manner" that the ILEC provides itself in the form of special access circuits.

V. THE FCC SHOULD EXPRESSLY REQUIRE THAT ILECS MAKE EELS AVAILABLE AS NEW SERVICES

Since the ILECs are required to provide access to combinations of UNEs, there should not be two sets of rules for obtaining the *exact same UNE combinations*. The only difference is the name of the circuit. The Supreme Court in *Iowa Utilities* explicitly indicates that the FCC can impose affirmative obligations for the ILEC to offer combinations.[47] It simply offends rational public policy for the basic ILEC unbundling obligation to have different terms and conditions for the exact same network element combination. For this reason, the current rules run afoul of the non-discrimination provision in Section 251(c)(3).

The lack of an affirmative obligation for ILECs to make EELs available when "ordinarily combined" has resulted in regulatory regime that discriminates against newer CLECs who by virtue of their business plans, do not already have large pre-existing

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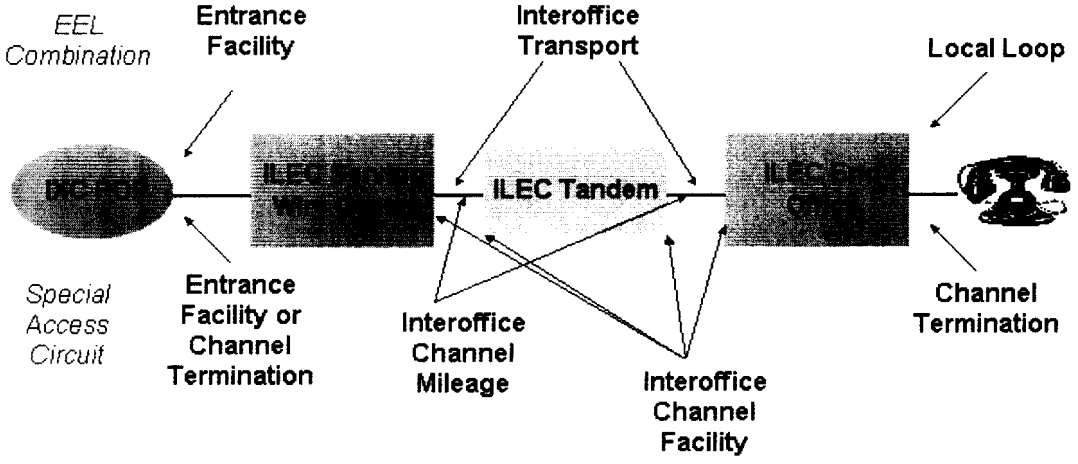
[46] *Local Competition First Report and Order*, at ¶ 518; *UNE Remand Order*, at ¶ 490.

[47] *See Iowa Utility Board* at p. 729 ("In response to the ILEC argument that Section 251(c)(3) contemplates the leasing of network elements only in discrete pieces and not in combinations, the Supreme Court stated that it was entirely reasonable for the Commission to find that the text does not support this conclusion. "[The Section] does not say, or even remotely imply, that elements *must* be provided only in this fashion and not in combined form."); *See also, Id.* at p. 729 ("In response to the ILEC argument that the phrase "on an unbundled basis" in Section 251(c)(3) means "physically separated", the Supreme Court stated, "The dictionary definition of "unbundled" (and the only definition given, we might add) matches the FCC's interpretation of the word: 'to give separate prices for equipment and supporting services' Webster's Ninth New Collegiate Dictionary 1283 (1985)").

inventories of special access circuits[48]. Carriers who have already leased special access circuits may convert them to EELs provided they meet local usage criteria. On the other hand, CLECs seeking to obtain the *exact same physical circuit* are unable to do so even if the circuit qualifies under current local usage criteria. Instead, the CLEC must first purchase the special access circuit at ILEC tariffed rates, hold the circuit for the minimum contract duration (which can be up to a year for a DS-3 in Verizon territory and up to 4 months in Bell South territory), and then convert the circuit to an EEL.

Exhibit 1

Commonly Provided ILEC Access Circuits



Currently, an IXC can convert a DS1-DS1 EEL in Zone 1 of a Top 50 MSA, while that same carrier cannot order the DS1-DS1 EEL as a new circuit. This distinction between

[48] 47 USC § 215(c)(2)(d).

whether the circuit is currently combined or not does not make sense. The ILEC obligation to provide access to network elements pursuant to the Act does not support a distinction based on "currently" or "ordinarily" combined status. To illustrate this point, consider how such a rule would manifest itself for UNE loops. Should an ILEC only be required to provide a DS1 loop at TELERIC pricing when it is "currently combined" to a particular customer location? Should a carrier seeking to purchase a DS1 circuit to a new location be required to pay tariffed rates? The answer is clearly no. Carriers should not be treated differently when purchasing the same type of circuit.

VI. FOR NEW EEL ORDERS, THE FCC SHOULD CONTINUE TO APPLY A "SIGNIFICANT LOCAL USE REQUIREMENT", BUT MAY PREDICATE THE REQUIREMENT ON CLEC'S SELF-CERTIFICATION

The FCC has affirmed that the Act does not permit usage restrictions on CLECs requesting access to unbundled network elements for the provision of a telecommunications service, which was later codified in Section 51.309(a).[49] Nonetheless, fearing that IXCs' unrestricted use of EELs in lieu of special access services would cause "substantial market dislocations and would threaten an important source of funding for universal service,"[50] the FCC provided a "temporary constraint" on the use of EEL to provide exchange access service until resolution of the Fourth FNPRM.[51]

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[49] *See UNE Remand Order* at ¶ 484; *See also,* 47 C.F.R. § 51.309(a) ("An incumbent LEC shall not impose limitations, restrictions, or requirements on requests for, or the use of, unbundled network elements that would impair the ability of a requesting telecommunication carrier to offer a telecommunications service in the manner the requesting telecommunications carrier intends").

[50] *See Implementation of the Local Competition Provisions Of the Telecommunications Act of 1996,* Supplemental Order Clarification, CC Docket No. 96-98, 20 CR 758, ¶ 7 (June 02, 2000) ("*Supplemental Order Clarification*"); *UNE Remand Order* at ¶ 485 ("Interexchange carriers could substitute low-priced EEL loop and transport combinations for tariffed special access services"); *Implementation of the Local Competition Provisions Of the Telecommunications Act of 1996,* Supplemental Order, CC Docket No. 96-98, 15 FCC Rcd 1760 ¶ 3 ("*Supplemental Order*").

[51] *See Supplemental Order*, at ¶ 2.

Specifically, IXCs may not convert special access services to EELs unless the IXC provides a "significant amount of local exchange service" to a particular customer.[52]

The ambiguity of what constitutes "significant" prompted the FCC to define the requirement using three "safe-harbor options."[53] The first option required the carrier to be the sole provider of the end-user's local exchange service, in which case, the carrier may provide "any type of traffic", including 100% interstate access traffic.[54] Under option #1, the reference to "any type of traffic" indicates that a carrier could also provide data traffic.

The objective of the final two safe harbor options is to ensure that the requesting carrier has taken "affirmative steps" to provide local exchange service to the end user, and is not using the facilities "solely" to bypass special access services. To this end, options #2 and #3 establish specific minimum levels of local exchange service that must be carried over the combinations to carry out that objective.[55]

a. The carrier is the customers "exclusive local exchange provider"

We support the continued application of current option #1. If a carrier certifies that it is the exclusive local exchange provider, by definition, the carrier is not using the EEL to bypass special access. This rule therefore is consistent with the policy objectives.

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52 *See Supplemental Order*, at ¶ 5.

53 *See Supplemental Order Clarification* at ¶¶ 21-23.

54 *Id.* at ¶¶ 22(1) ("Under this option, the requesting carrier is the end user's only local service provider, and thus, is providing more than a significant amount of local exchange service").

55 *Id.* at ¶¶ 22(2)-(3) (The second option requires at least 1/3 of the end user's local traffic measured as a percent of the total end user local dialtone lines; and for DS1 and above at least 50% of the activated channels on the loop have at least 5 percent local voice traffic individually with the entire loop facility having at least 10% local voice traffic. Third option requires at least 50% of the activated channels on a circuit be used to provide local dialtone and at least 50 percent of the traffic on each of these local dialtone channels is local voice, and the entire loop facility has at least 33% local voice traffic).

b. The carrier passes no more than 67% of the total circuit capacity as exchange access service.

This proposed rule takes the existing rule under option #3, and inverts it to create a standard that is more precise and easier to administer.[56] Using this simplified rule, carriers measure the amount of exchange access directly, rather than relying on the imputation that all traffic than is not local traffic is exchange access. This may be true for circuit-switched carriers, but it is certainly not the case for those using packet-switching technology. By permitting no more than 67% of exchange access, the most restrictive interpretation of the current rule, the FCC will ensure the objective of limiting the amount of exchange access is met.

VII. CLECs SHOULD NOT BE REQUIRED TO COLLOCATE AS A PRECONDITION FOR OBTAINING AN EEL

The FCC found that "collocation imposes materially greater costs on requesting carriers than use of the incumbent LEC's switching."[57] Due in part to high non-recurring charges, collocation even in a dense wire center may only be economically feasible if the CLEC obtains significant market penetration.[58] In some instances, the costs associated with collocation and the revenue opportunities associated with a given wire center may not justify establishing a collocation arrangement at all.[59] The FCC explicitly authorized interexchange carriers to use unbundled dedicated transport from their POP to a serving wire center in order to provide local telephone exchange service.[60] Moreover, the FCC

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56 The concept of inverting the rule in option number 3 was originally articulated to BroadRiver Communications verbally by Cbeyond Communications in a meeting on March 20, 2001.

57 *See UNE Remand Order* at ¶ 263.

58 *Id.*

59 *Id.*

60 *Id. at* ¶ 488.

recognizes this in the third "safe harbor" option, which does not require CLECs to collocate.[61] As explained above, collocation really bears no relation to the type of service being provided to the end user. If a CLEC meets the local usage criteria, there is no reason that it should collocate to serve that end user.

VIII. IMPLEMENTATION OF BROADRIVER'S PROPOSAL WILL BE EFFICIENT AND ENABLE NEXT GENERATION CARRIERS TO BRING COMPETITION AND ADVANCED SERVICES TO THE LOCAL TELECOMMUNICATIONS MARKETPLACE

We request that the requirements in this proposal to be incorporated into the *Fourth FNPRM* scheduled for release mid-year.[62] This will provide CLECs the ability to continue and expand their deployment schedules with the certainty that the "ordinarily combined" EEL combinations will be available in their market areas without the obligation to collocate in an ILEC Central Office. Otherwise, due to the significant upfront costs and time delays associated with the traditional, facilities-based collocation model, CLECs will be forced economically to roll-back deployment significantly only into those large MSAs where the density and customer revenue combinations will support the extensive collocation model. Additionally, by placing additional restrictions on the UNE-P carve-out, the ILECs will be relieved of their obligation to provide unbundled switching pursuant to the proposed rules, and carriers operating their own switching equipment and deploying advanced networks will be able to bring competition and innovation to the local markets through the use of EELs.

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61 *See Supplemental Order Clarification*, at ¶ 22(3).

62 *Id.* at ¶ 33 (The FCC took immediate action in addressing the problems associated with the "significant local use" definition by issuing the Supplemental Order Clarification between November 24, 1999, the release date for the Supplemental Order, and June 2, 2000, the release date for the Supplemental Order Clarification. This proposal addresses immediate and pressing issues that are of equal or greater importance in the marketplace for local telecommunications service).

IX. CONCLUSION

The Telecommunications Act of 1996 promises to allow competitive carriers to maximize the capabilities of their technologies, finances and managerial ability to rapidly introduce advanced telecommunications services to all Americans. Moreover, CLECs should be allowed to use UNEs in any technically feasible manner where necessary to redress competitive impairment. As the FCC has already found, competition outside Density Zone 1 of the top 50 MSAs is sufficiently impaired to warrant unbundling of the entire ILEC network. BroadRiver and Epana simply ask the Commission to lift the current artificial constrain on their ability to use these sub-elements of the UNE platform so they may bring next-generation networks and their capabilities to customers outside these areas. By the same token, the FCC should apply local usage measurements in a technologically neutral fashion.